differently from other privileges of a witness, which must be asserted to be claimed. The technical rule adopted by the Michigan court, excluding this evidence unless the witness was instructed as to his privilege by the court, seems undesirable.

WITNESSES — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT — WHERE THEY ARE CO-TRUSTEES. — The plaintiff filed a bill against the trustees named in a will, claiming to be the *cestui que trust* of a secret trust, and praying discovery of certain documents. The defendants refused to produce them on the ground that they were confidential communications between one of the trustees as solicitor and his co-trustees as clients. The documents related to trust matters but were not made in contemplation of the present action. *Held*, that they were privileged. *In re Whitworth*, [1919] 1 Ch. 320.

A trustee cannot, as against his *cestui*, claim privilege for communications to an attorney in regard to trust matters, unless they are written in respect to the present litigation. *Devaynes* v. *Robinson*, 20 Beav. 42; *Talbot* v. *Marshfield*, 2 Dr. & Sm. 549. This is so because the *cestui* has an equitable right in the documents. A mere claim to be a *cestui*, however, is not sufficient to defeat the privilege. *Wynne* v. *Humbertson*, 27 Beav. 421. The prime requisite of this privilege in any case is that the communication be incidental to the relation of attorney and client. *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310. *Turner* v. *Turner*, 123 Ga. 5, 50 S. E. 969. That there was also the relation of co-trustees between the same persons should not preclude the existence of this requisite. In England a solicitor-trustee cannot charge the estate compensation for professional services, unless they were rendered in a judicial proceeding. *Bainbrigge* v. *Blair*, 8 Beav. 588; *Lincoln* v. *Windsor*, 9 Hare, 158. Hence in the principal case, since compensation was charged, the co-trustees must have consulted the solicitor-trustee as a solicitor, not as a trustee. Thus the general principles governing this privilege were properly applied.

WITNESSES — PRIVILEGED COMMUNICATIONS — CHILD DELINQUENT AND JUVENILE COURT JUDGE. — A twelve-year-old boy confessed in strict confidence his part in the murder of his father to the juvenile court judge of his district. Thereupon delinquency proceedings were instituted against him. At the trial of the boy's mother for the murder he testified in her favor. To impeach this testimony the judge was asked to divulge the boy's confession. Though notified that the boy had consented to his testifying he refused; was ordered by the court to do so; again refused; and was adjudged in contempt of court, and fined. *Held*, that the judgment be affirmed. *Lindsey* v. *People*, 181 Pac. (Colo.) 531 (1919).

For a discussion of this case, see NOTES, p. 88.

BOOK REVIEWS

THE BARONIAL OPPOSITION TO EDWARD II. A Study in Administrative History. By James Conway Davies, Emmanuel College, Cambridge. Cambridge: The University Press. 1918. pp. x, 644.

"What the study of English mediæval history wants, if it is to be kept up as a living thing," declares Professor Tout, "is a more technical and detailed cataloguing and systematising of the dry facts. It is only when the spade-work of history has been done that we may hope to come to any authoritative generalisations." No part of English history has suffered more for the lack of this indispensable "spade-work" than the fourteenth century, and no one has made a more promising beginning of such work than Professor Tout himself in his "Place of Edward II in English History."

For a long time it has been apparent that Stubbs's account of this century, masterly though it is, is inadequate. The rapid growth of parliamentary institutions after the reign of Henry III drew his attention away from the administrative development which he had treated with greater fullness for the period preceding, and we have had no adequate account of England's administrative history in the all-important fourteenth century, such, for example, as Viollet gives us for France in his "Histoire des Institutions Politiques et Administratives de la France."

A beginning has happily now been made in the supplying of this defect by such books as Harcourt's "His Grace the Steward," and by these works of Professor Tout and Mr. Davies on the administration under Edward II, which, it may be hoped, will be followed up by similar studies for the equally important half century of Edward III's reign. Mr. Davies's volume is an attempt to do for the reign of Edward II much the same as is done in Mr. Tout's earlier work, but in a more minute and exhaustive way, the result of a more extensive examination of the official records, both printed and unprinted; and if its completeness as a "technical and detailed cataloguing and systematising of the dry facts" be a test, its success is unquestionable: the result is a book which no serious student of English legal and institutional history will safely dare ignore, but one that none but the most serious is likely to read through.

The author has given us the fullest account we have of the English administrative system at a critical period in the struggle between royal rights and baronial claims which marks the first stage in the growth of that control over the exercise of the powers of the Crown summarized by our phrase "the limited monarchy." The gradual evolution of the means of securing this control is one of the most significant things in English history as a whole, and Edward II's reign is no insignificant part of it. As usual in this development, the baronial opposition was actuated by temporary and practical motives; but in this case the barons attempted almost for the first time to justify their action by an appeal to a principle that we may term constitutional — the distinction between the King and the Crown, what Mr. Davies calls "the doctrine of capacities," a principle second to none in importance in the development of English constitutionalism. Mr. Davies unduly belittles the importance of his own work and evinces a remarkable ignorance of the later history of England in his assertion that this important doctrine "was . . . to have no future in English history or political theories."

But the famous attempt of the Lords Ordainers to control the Crown, though it must be considered an important precedent for future development, was in itself a practical failure, and the bulk of Mr. Davies's book consists in a successful attempt to explain this failure. In a word, the failure was due to the fact, then a practical actuality, now become only a legal fiction, that the King was the sole executor of the law. The enforcement of law, even the authentication and publication of a statute of Parliament, was not only solely his as a matter of law: in the time of Edward II all these things remained subject to his personal control as a matter of fact. This immense power the baronial opposition was utterly unable to wrest from the King, try as the barons would, and herein lies the explanation of their failure.

To make it clear, a full description of the existing executive organs and their methods is necessary, and Mr. Davies satisfactorily supplies it. The chief factor in the King's success against all the baronial onslaughts is his ability personally to control the administration of his Household, and at the same time to make the Household a part of the actual administration of the State. When his control of the Exchequer and the Chancery was successfully disputed, he took refuge in the Chamber and the Wardrobe, through which he continued to exercise his personal will over the public funds and the administration of the government, and from this refuge no assaults of the barons were yet strong

enough to dislodge him. Through his use of the privy seal, of the signet, of the secret seal, and even of informal instructions or oral commands, he was able not merely to secure fulfilment of his personal will in competition with the more formal documents under the great seal which had passed out of his power with the assertion of baronial control over the Exchequer and the Chancery: he was strong enough by the same means even to invalidate the acts of these great departments of government. The King was still too powerful to be reduced to the abstraction we call the Crown. Edward for the time was successful in his challenge of "the doctrine of capacities."

The elucidation of these things leads Mr. Davies to treat of many things of the greatest importance to the legal historian. His study of this period strengthens the impression, more vividly felt, alas! by historians than by lawyers as a rule, that the definition of the jurisdiction of the several courts was in this general period by no means so exact as it is often represented, and that the organization of the courts was much more fluid. The King's frequent personal interference with the processes of the courts, which is here proved, is also likely to surprise a reader of the older histories of our law.

There is not much of a controversial nature in Mr. Davies's book. The author is usually content to illustrate and amplify views that have already been pretty generally accepted on slighter evidence. But where he does occasionally touch a controverted point his reasons are usually convincing. His fuller examination of the unprinted records somewhat dulls the edge of Stubbs's dictum that Edward II was "the first King since the Conquest who was not a man of business." In these disputed questions Mr. Davies usually follows the safe lead of Professor Tout, notably in his rejection of the theory of a struggle for power between the Exchequer and the Chancery which he characterizes as "an imaginary feud"; but in one case he presents cogent arguments for an independent view on a subject of considerable importance for the constitutional lawyer and historian. An enactment by a Parliament at York in 1322 has been supposed to be the first formal declaration that no statute is binding unless assented to by King, Lords, and Commons, and hence a landmark in the history of the House of Commons. In 1913 Mr. G. T. Lapsley cast doubt upon this by insisting that the famous enactment concerned only such matters as affect the framework of government with which the ordinances of 1311 had dealt, thus incidentally inferring what is of far greater constitutional consequence — the existence of the idea of a "constitutional law" as early as the fourteenth century. This theory has been accepted by Professor Tout, but Mr. Davies has given convincing reasons for its complete rejection. In Mr. Davies's judgment this provision refers to the *jus regni* as a whole. "What touches all should be approved by all." The real distinction drawn is not between "constitutional" matters and ordinary law, but between the *jus coronae* and the *jus regni*. The former is beyond the reach of Parliament entirely; for the latter, the assent of King, Lords, and Commons is necessary. It is not a difference between ordinary and "constitutional" enactment; it is a distinction between the law of the Crown and the Law of the Realm. For the long history of fundamental law this is of great importance. C. H. McIlwain.

EQUITY, AN ANALYSIS OF MODERN EQUITY PROBLEMS DESIGNED PRIMARILY FOR STUDENTS. By George L. Clark, S. T. D., Professor of Law in University of Missouri. Columbia, Mo.: E. W. Stephens Publishing Company. 1919. pp. 639+52.

There is a real need for short textbooks on important branches of the law. We cannot reasonably expect more than one exhaustive treatise on a subject